G-002/AI-94-698 ORDER APPROVING AGREEMENT

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Don Storm	Chair
Tom Burton	Commissioner
Marshall Johnson	Commissioner
Cynthia A. Kitlinski	Commissioner
Dee Knaak	Commissioner

In the Matter of a Petition by Northern States Power Company - Gas Utility for Approval of Contribution in Aid of Construction to Viking Gas Transmission Company for a Pipeline Interconnect at Pierz to Serve the Lakes Area	ISSUE DATE: December 23, 1994 DOCKET NO. G-002/AI-94-698 ORDER APPROVING AGREEMENT

PROCEDURAL HISTORY

On July 28, 1994, Northern States Power Company - Gas Utility (NSP Gas or the Company) filed a petition with the Commission requesting approval of an affiliated interest agreement between itself and Viking Gas Transmission Company (Viking), effective June 28, 1994.

On September 26, 1994, the Minnesota Department of Public Service (the Department) filed its comments. The Department recommended that the Commission approve the Company's agreement with Viking subject to reporting requirements and a variance request.

On October 10, 1994, NSP Gas filed Reply Comments. The Company agreed with all the Department's recommendations with two exceptions. First, the Company requested that the actual cost data be submitted thirty days *after* the receipt of the final bill from Viking rather than 30 days after the completion of the project. Second, the Company questioned whether a petition for a variance is always required if an affiliated interest agreement is filed after the execution date or the proposed effective date.

On December 8, 1994, the Commission met to consider this matter.

FINDINGS AND CONCLUSIONS

A. The Agreement Between NSP Gas and Viking

The agreement provides that NSP Gas will pay Viking an estimated $101,800 as a contribution in aid of construction (CAIC) for new facilities to be constructed, owned, and operated by Viking. The facilities will be located at the Pierz interconnection between Viking and Northern Natural Gas Company (Northern). NSP explained that the facilities are needed to enable it to serve its new customers in the Lakes Area while minimizing incremental pipeline facilities and more efficiently utilizing contract demand entitlements on Northern and Viking.

B. The Department's Recommendations

The Department recommended that the Commission approve the Company's agreement with Viking subject to reporting requirements and a variance request. In addition, the Department recommended that the Company be required to maintain certain records regarding its agreement with Viking for future review.

C. Commission Analysis and Action

1. Approval of the Agreement

The Commission has reviewed the Company's filing and finds that it has met the filing requirements of Minn. Rules, Part 7825.2200. In addition, the Commission finds that the agreement between NSP Gas and Viking for the construction of additional facilities to serve the Lakes Area is reasonable and in the public interest. Accordingly, the Commission will approve it.

2. Reporting Requirement

One of the requirements of Minn. Stat. § 216B.48 (1992) is that a utility proposing to enter into a contract with an affiliate must provide information about the *actual cost* to the affiliate of furnishing property to the utility, unless it is reasonable not to require this information. In this case, the Department noted that the Company has supplied only the *estimated cost*.

The Department recommended, however, that submission of the estimated cost should be allowed at this time in this case. The Department argued that, consistent with the terms of the statute, it is "reasonable" not to require the actual cost information at this time because the final actual cost information will not become available until the construction is completed. The Department recommended, therefore, that the Commission approve the agreement based on the estimated cost information and simply direct the Company to provide the actual cost information within 30 days after completion of the project.

NSP Gas responded that it would certainly provide the actual cost information, but requested that it be allowed to do so 30 days after receipt of the final bill from Viking rather than 30 days after completion of the project.

The Commission agrees with the Department's view of the statutory requirement regarding the cost information. In this case, there is good reason not to require *actual* cost information prior to approving the agreement. Regarding the timing of submission of the actual cost information, the Commission finds that the Company's proposed timing (30 days after receiving the final bill from Viking) will provide the required information in a timely fashion. The Commission will so order.

3. Variance

Minn. Rules, Part 7825.2100 states that written approval must be obtained from the Commission prior to entering into an affiliated interest agreement. The Department argued that a variance must be submitted for Commission approval because the parties entered into the agreement prior to receiving written Commission approval.[1] The Department further argued that because prior approval was not given, the Commission could prohibit recovery of the costs of the Viking facilities.

The Company responded that the rapid pace of transactions in the natural gas industry makes it

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[1] In addition to the rule, Minn. Stat. § 216B.48, subd. 3 (1992) states that an affiliated interest agreement is not valid or effective unless and until the agreement has received written approval of the Commission. The statutory requirement, of course, is not subject to variance.

difficult to seek pre-execution approval of affiliate agreements. NSP stated that it questioned the need to obtain prior approval because the Commission's rulings in previous NSP affiliate transaction dockets have not been perfectly consistent.

NSP stated, however, that if the Commission did determine that a variance was necessary it merited such a variance based on the standards for a variance set in Minn. Rules, Part 7829.3200. The Company argued that enforcement of the rule would impose an excessive burden because it was finalizing the terms and conditions of the agreement with Viking right up to the time of execution and needed to implement the agreement promptly so that it would be able to make natural gas service available in the Lakes Area for the start of the 1994-95 heating season. As for the public interest standard, the Company asserted that the agreement itself served the public interest and that notifying the Commission of affiliate transactions at some point prior to setting retail rates (but not necessarily prior to execution of the contract) would have adequately protected the public interest. Finally, the Company stated that the requirement that Commission approval prior to execution of the agreement was not a statutory requirement.

First, regarding Minn. Rules, Part 7825.2100, the language of that rule speaks for itself:

> A public utility, ***prior*** to entering into a contract or agreement or making any modifications or revisions to existing contracts with an affiliated interest, where the total consideration for such contract agreement is in excess of $10,000 or five percent of the capital equity of the utility, whichever is less, shall petition for ***and*** receive approval from the commission by formal written order. (Emphasis added.)

Whatever confusion NSP may have felt based on prior decisions, the rule clearly required that prior to entering into a contract of this size with Viking, NSP had an obligation to receive prior approval to do so from the Commission in a written Order.[2] Having failed to do so, the Company is in non-compliance with that rule and must obtain a variance from the rule's prior consent requirement in order to restore itself to a state of compliance in this respect. A request for variance is the appropriate vehicle to approach this issue.

Second, regarding the merits of the Company's request for a variance, the Commission finds that the standards for granting a variance are met but not for all the reasons stated by the Company.

Excessive Burden: in support of its assertion that requiring prior approval of its agreement with Viking would have been an excessive burden, the Company argued, among other things, that it did not have time to obtain permission from the Commission prior to entering into its agreement with Viking. This was the case, the Company asserted, because the parties were negotiating right up to the moment that they agreed and signed the contract. As far as it goes, this reasoning is insufficient.

Absent a showing of circumstances warranting contract performance prior to Commission approval, adherence to the prior approval requirement imposes no excessive burden. The Company could have simply inserted a provision in its agreement with Viking that the agreement was subject to Commission approval (by Order) and that performance of the agreement would not begin before such approval was obtained.

The Company went on to assert, however, that it needed to implement the Agreement promptly

[2] NSP urges the Commission to administer the rule according to its spirit and find that its does not require prior approval. The rule sets a priority on Commission review of a utility's agreements with affiliates *before* they go into affect to assure that the interests of ratepayers are safeguarded before the fact rather than after-the-fact. That is the spirit of the rule. The Company's approach would amend the rule by changing the expectation from one of prior approval to after-the-fact approval.

so that it would be able to make natural gas service available to the Lakes Area for the start of the 1994-95 hearing season. The Commission would prefer a more detailed presentation of the facts which, in the Company's view, impelled it to act prior to obtaining Commission authorization. However, in this case the Commission will exercise its discretion and accept the Company's statement as adequate to show that abiding by the rule's requirement would have imposed an excessive burden on the Company or others affected by the rule, i.e. in this case, NSP's new customers in the Lakes Area.

Public Interest: NSP argued that since the agreement with Viking cannot affect NSP Gas general retail rates, filing the agreement after execution and the proposed effective date will not adversely affect the public interest. The Company's argument suggests that setting just and reasonable retail rates is the Commission's only public interest consideration. However, the Commission has other valid public interest concerns which make prior review valuable. Examples of such public interest concerns are 1) to prevent the Company's financial position from being weakened by a non-market rate transaction with an affiliate and 2) to nip in the bud any potential for cross-subsidization of the affiliate. Finally, the fact that a contract has little or no rate impact does not guarantee that it is in the public interest.

This clarification made, the Commission finds that in this instance the affiliate contract in question appears appropriate.[3] In addition, this Order has clarified the Commission's expectations with respect to compliance with the prior approval rule. In these circumstances, the Commission finds that eliminating the Company's non-compliance with the rule by granting the requested variance will serve the public interest.

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[3] The Commission notes, however, that despite this variance and approval of the proposed affiliated interest contract in this Order, the Commission retains right to disallow or disapprove payments made by NSP pursuant to this contract if, upon actual experience under such contract, it finds that the payments were unreasonable. Minn. Stat. § 216B.48 (1992).

No Conflict With Standards Imposed by Law: The prior approval requirement is not imposed by statute, but by rule. Therefore, the requirement is subject to variance as provided for in Minn. Rules, Part 7829.3200.

4. Record Maintenance

Minn. Rules, Part 7825.2300 requires a public utility entering contracts or agreements with an affiliated interest to maintain a copy of the contract or agreement and certain accounting records. The Company is obligated under this rule to maintain these records with respect to its agreement with Viking.

ORDER

1. The Agreement between Northern States Power Gas Utility (NSP Gas or the Company) and Viking Gas Transmission Company (Viking) is approved, effective June 28, 1994.

2. NSP Gas shall submit actual cost information for the Viking facility expansion for both NSP Gas and Viking within 30 days after receiving the final bill from Viking after the completion of the project.

3. The Company's request for a variance from the prior approval requirement of Minn. Rules, Part 7825.2100 is granted.

4. As required by Minn. Rules, Part 7825.2300, NSP Gas shall maintain a complete record of the agreement in this matter, including all the bids submitted where a bidding process occurred, for review at any time in the future.

5. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)